NO.: 93-204

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
JUL 26 1993
OFFICE OF THE CLERK

UNITED STATES OF AMERICA,

Respondent

versus

ALEX WEINGARTEN,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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51

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QUESTION PRESENTED FOR REVIEW

1. WHETHER THE CALIFORNIA SUPREME COURT ERRED WHEN IT FAILED TO REVERSE THE LOWER COURT'S FINDING THAT THE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT LACKED PROBABLE CAUSE.

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I.

OFFICIAL REPORTS OF OPINIONS

Although a written opinion has been provided to counsel, there has not yet been an official published opinion.

II.

JURISDICTION

Judgment was entered by the California Supreme Court on May 26, 1993. This Court has jurisdiction pursuant to Article III, Section 2, Clause 1 of the United States Constitution.

III.

CONSTITUTIONAL PROVISIONS

The issue presented before this Court implicates a defendant's Fifth Amendment Due Process right incorporated into the Due Process Clause of the Fourteenth Amendment.

United States Constitution, Fifth Amendment:

> No person shall...be deprived of life, liberty or property, without due process of law.

IV.

STATEMENT OF THE CASE

Petitioner was arrested in July, 1990. The petitioner, Alex Weingarten, was charged with five counts including: conspiracy to commit a crime, sale or transportation of cocaine, possession of cocaine for sale, and possession of money or instruments over $100,000.

On December 27, 1990, petitioner moved the Court for an order quashing the search warrant executed at 10535 Wilshire Boulevard. In addition, the petitioner moved the Court to order disclosure of the identity of the confidential informant as well as to hold an in camera hearing to determine whether to disclose the identity of the confidential informant. The petitioner also moved the Court to set aside the instant information pursuant to Penal Code Section 995.

On January 18, 1991, the Court granted defendant's motion to set aside Count 4 of the information, possession of money or instruments over $100,000. The Court, however, refused to

dismiss the remaining counts. Further, the Court denied defendant's motion to order an in camera hearing and to disclose the identity of the confidential informant.

Moreover, on March 1, 1991, the Court denied defendant's motion to quash to search warrant.

On September 11, 1991, the petitioner entered a plea to Count 4 of the information. The remaining counts were dismissed pursuant to the People's motion.

On October 10, 1991, the Court sentenced the petitioner to three years in state prison. The trial judge signed a certificate of probable cause for an appeal, and Petitioner timely appealed.

On February 24, 1993, the Court of Appeal of the State of California, Second Appellate District, Division Four, affirmed the lower Court's finding. Petitioner's petition for review with the California Supreme Court, on April 5, 1993, was thereafter denied on May 26, 1993.

V.

STATEMENT OF THE FACTS

Between April and July, 1990, the Los Angeles Police Department conducted a surveillance in the San Fernando Valley. They allege the following:

On June 1, 1990, Detective Sanchez observed Dan Gold give a satchel to Hanan Dranes at a location on Ventura Boulevard and Rhodes. Subsequently, Detective Anderson, who was situated at the corner of Ventura Boulevard and Willis Street, observed petitioner Weingarten drive into the Sav-on parking lot at that location. Dranes was observed giving the brown satchel to petitioner Weingarten. Weingarten was never observed looking inside of the satchel. Weingarten then entered a green Mercedes and proceeded to Willis and Hortense, entering an apartment complex at 4600 Willis carrying the satchel.

Shortly thereafter, Dranes arrived at 4600 Willis and entered the building. Approximately five minutes after Weingarten arrived at the

location, Dranes exited the building with the satchel. Dranes then drove to Burbank and Balboa where he was met by a male Hispanic in a brown Chevrolet. Subsequently, Dranes went back to the 4600 Willis address. The latin male who now possessed the satchel met with another Latin male at a Price Club parking lot in Downey. These two Latin males were then arrested by another police agency that was conducting an independent investigation. The satchel was recovered and searched and found to contain approximately $140,000 in U.S. currency.

During the three-month surveillance, Detective Anderson often saw Dranes and Weingarten together. Frequently, Weingarten made telephone calls, many times appearing to place "beeper" calls from public telephones to unknown individuals who would apparently return the call. The officers never heard the contents of any of these phone calls.

On July 12, 1990, Dranes was observed leaving the 4600 Willis location and meeting

another individual, Jelenicki, with whom he exchanged bags. Jelenicki was then arrested and one kilogram of cocaine was recovered from his vehicle. Thereafter, Dranes was taken into custody. A subsequent search of the Chevrolet in the Willis address parking garage uncovered approximately four kilograms of cocaine. Dranes was the only individual ever observed going into that vehicle.

Officers then sought and obtained a search warrant for Apartment Number 902 at 10535 Wilshire Boulevard, which police believed that Weingarten occupied.

The Search Warrant Affidavit states, in pertinent part, the following:

> "Your affiant is currently investigating a group involved in distributing multi kilograms of cocaine in the Los Angeles area. Your affiant received information concerning this group from a confidential informant (CI). The CI has personally seen members of this group in the possession of kilograms of cocaine. According to the CI the group consists of:
>
> 1. DAN GOLD, male, Israeli, black hair, brown eyes, approx. 6'1", 190 lbs., DOB 1-28-49, DMV reveals

an address of 18701 Tulsa Street, Northridge, California.

2. ALEXANDER WEINGARTEN, male, Israeli, blond hair, blue eyes, approx. 6'2", 200 lbs., DOB 9-8-46.

3. HANNAN DRANES, male, Israeli, grey hair, and unknown color eyes, 6', 180 lbs., DOB 9-30-44.

According to the CI this group is lead by DAN GOLD with the other two suspects delivering cocaine at his direction. The CI has viewed photographs of each of the above suspects as part of his identification process."

The CI does not specifically say that he/she has even seen Weingarten in possession of cocaine. The CI simply says that Weingarten is a member of this purported "group" and that the CI has personally seen (unspecified) member of this group in possession of cocaine.

The search of the Wilshire address uncovered 13 American Express money order receipts, two torn pieces of paper with Hebrew writing and phone numbers, a spiral notebook, and a Florida driver's license. Neither drugs, nor any drug paraphernalia, including pay-and-owe sheets and ledgers, were recovered from the residence.

The manager of the Wilshire apartments informed Detective Anderson that the occupant of the Apartment 902, defendant Weingarten, was known to him as "David Cohen."

A search of the Willis apartment uncovered a document testified to as a pay-and-owe sheet.

VI.

CURRENT STATE OF THE LAW

Justice Brandeis stated in Olmstead v. United States that the makers of our Constitution enacted the Fourth Amendment "to protect Americans in their beliefs, their thoughts, their emotions and their sensations." 277 U.S. 438 (1928). The concept of "probable cause" is central to the protection of this right.

"The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961).

A. Validity of the Search Warrant

In analyzing the issuance of a search warrant, the duty of a reviewing Court is "to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-239 (1983).

The fact that there is probable cause to believe that a man has committed a crime does not automatically give the police probable cause to search his home for evidence of that crime. United States v. Ramos, 923 F.2d 1346 (9th Cir. 1991).

There is no probable cause to search a defendant's house for narcotics or business records where continuous surveillance of those premises revealed no suspicious activity there. United States v. Gramlich, 551 F.2d 1359 (5th Cir. 1977). In Gramlich, the defendant was arrested while unloading marijuana from a Columbian freighter and other evidence indicated his substantial involvement in a smuggling operation.

In the instant case, the appellate Court noted that the magistrate must have a substantial basis for concluding that probable cause existed and that probable cause requires a showing that evidence will be found in a particular place. Both the California Supreme Court and the appellate Court, nevertheless, upheld the validity of the search warrant even though there lacked a nexus between the place to be searched and the criminal activity in question. The Courts ignored the well-established law that an individual's presence at a residence alone does not establish a sufficient connection with the residence to support a finding of probable cause. United States v. Savoca, 761 F.2d 292, 297 (1985). Instead, the reviewing Courts simply relied upon the hunches of a law enforcement official that since narcotics dealers keep records of their transactions and often secure the drugs and money in a location under their dominion and control, it is likely that petitioner's resi-

dence contains incriminating evidence. (Appellate Opinion at 12-13).

While some California cases have recognized that in drug trafficking cases there is probable cause to search a drug dealer's residence, these cases did not involve non-drug dealers who are, at best, peripherally involved in a possible narcotics conspiracy. People v. Johnson, 21 Cal.App. 3d 235 (1971); People v. Aho, 166 Cal.App.3d 984 (1985); People v. Koch, 209 CAl.App.3d 770 (1989). In all the above-mentioned cases, the police suspected that the defendant was actually dealing in narcotics.

In the instant case, the reviewing Courts ignored the fact that the petitioner is not a drug dealer. The petitioner has not been witnessed possessing, selling, buying, or negotiating narcotics deals. The petitioner was associated with a group of people who were suspected of illegal activities. An association with even an alleged drug dealer does not, a fortiori, make someone a narcotics trafficker.

At most, the alleged evidence against the petitioner suggested a possible money laundering connection.

Furthermore, there are no facts linking the residence to illegal activity. Law enforcement agents engaged an extensive surveillance of Weingarten's activities and not once observed a suspicious incident concerning the Wilshire address. Neither Gold nor Dranes were ever seen at or around Weingarten's residence. The only person ever observed at the Wilshire location was Weingarten. Yet, the petitioner's presence at the Wilshire location does not establish a sufficient connection with the residence to support a finding of probable cause. United States v. Savoca, supra at 297.

Law enforcement officials simply did not have sufficient information regarding the Wilshire residence to present to the magistrate. The problem may have been that the lengthy affidavit concerned multiple residences, automobiles, and numerous observations. Amidst all the detail provided for the

other places and things to be searched, the absence of facts implicating the Wilshire residence was not as readily noticeable as it would have been in a single residence warrant.

Since the foregoing facts indicate that the magistrate did not have a substantial basis for concluding that probable cause existed to search petitioner's residence, the California Appellate Court and California Supreme Court erred when they refused to reverse the trial Court's decision and denied a petition for review.

B. Good Faith Reliance

While the Supreme Court has held that evidence obtained by an officer acting in objective good faith reliance of a defective warrant may be introduced in Court, the Court also noted that a good faith reliance is no defense where an objectively reasonable officer would seriously question the sufficiency of evidence establishing probable cause. United States v. Leon, 468 U.S. 897 (1984).

In People v. Camarella, 54 Cal.3d 592 (1991), the California Supreme Court considered the Leon exception: in determining when an affidavit is "so lacking an indicia of probable cause" that it would be objectively unreasonable to believe cause exists, the Court adopted the following test: whether a reasonable and well-trained officer would have known [at the time his affidavit was to be presented to the magistrate] that his affidavit failed to establish probable cause and that he should not have applied for the warrant.

Based upon the Camarella analysis, the Leon good faith exception is not applicable to this case. The instant affidavit is absolutely barren of any information which could provide a nexus between the alleged suspicious activities and the Wilshire residence. The affidavit in the instant case merely speculates that criminal evidence will be found at the Wilshire address and fails to provide any facts to support this allegation. The only facts in the affidavit which relate to the Wilshire

residence are: 1) Weingarten resides at 10535 Wilshire Boulevard in Apartment 902, 2) Weingarten has been followed to this location on numerous occasions, and 3) Weingarten resides at the premises under an assumed name. The affidavit does not establish the existence of suspicious activity concerning this location nor does it establish that anyone but Weingarten was ever seen near this location.

Since the validity of the warrant was supported solely by the belief of law enforcement officials that petitioner was somehow involved in a narcotics conspiracy and that it was likely that incriminating evidence would be found in the apartment, the affiant failed to present sufficient information about the residence on which the magistrate could issue a warrant. Thus, probable cause was obviously not shown, and an objective belief in the existence of probable cause was entirely unreasonable. Consequently, the appellate Court erred when it

found that there was good faith reliance on the warrant by the affiant in executing the search.

VI.

CONCLUSION

Based upon the foregoing, Petitioner ALEX WEINGARTEN respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

APB/7.15/PS:ma

APPENDIX A

Second Appellate District,
Division Four, No. B064351
S032020

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

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THE PEOPLE, Respondent

v.

ALEX WEINGARTEN, Appellant

==========

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX B

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALEX WEINGARTEN, Defendant and Appellant	)	CASE NO. B064351 (Superior Court No. BA021813 Consolidated with Superior Court No. BA024189)

APPEAL from a judgment of the Superior Court of Los Angeles County, J. Stephan Czuleger, Judge. Affirmed.

Marks & Brooklier and Anthony P. Brooklier for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Robert F. Katz, Supervising

Deputy Attorney General, Sonja K. Berndt, Deputy Attorney General for Plaintiff and Respondent.

By amended information, Alex Weingarten was charged with one count of conspiracy to sell cocaine, two counts of sale or transportation of cocaine, and one count of possession for sale of cocaine, with special allegations as to the quantity of cocaine involved. He moved to quash the search warrant and to suppress the evidence resulting from that search. He also moved for an in camera hearing to determine whether the identity of the confidential informant should be disclosed. After these motions were denied, Weingarten withdrew his plea of not guilty and entered a plea of nolo contendere to one count of possession of cocaine for sale. (Health & Saf. Code, §11351.) He admitted the special allegation that the substance possessed for sale was a substance containing 28.5 grams and more of cocaine and 57 grams and more of a substance containing cocaine. (Pen. Code, §1203.073, subd. (b)(1).)

Weingarten challenges the denial of his motions. We find no error and affirm. The pertinent facts are set forth in our discussion.

DISCUSSION

I

Disclosure of Confidential Informant

In his affidavit in support of the search warrant in this case, Officer Moreno stated: "Your affiant is currently investigating a group involved in distributing multi kilograms of cocaine in the Los Angeles area. Your affiant received information concerning this group from a confidential informant (CI). The CI has personally seen members of this group in the possession of kilograms of cocaine. According to the CI the group consists of: [¶] 1. DAN GOLD, . . . [¶] 2. ALEXANDER WEINGARTEN, . . . [¶] 3. HANNAN DRANES, . . . [¶] According to the CI this group is lead by DAN GOLD with the other two suspects delivering cocaine at his direction. The CI has viewed photographs of each

of the above suspects as part of his identification process."

Appellant moved for disclosure of the identity of the confidential informant, and the motion was denied. Appellant contends the trial Court erred in failing to order an in camera hearing to determine whether to disclose the identity of the confidential informant.

Respondent argues that this issue is not cognizable on an appeal following a plea of nolo contendere. "A motion to discover the identity of an informant is not a section 1538.5 motion, but, rather, is a motion to discover evidence in the form of the informant's information, which might lead to defendant's exoneration. By pleading guilty (or nolo contendere), defendant admits the truth of the allegations against him, and the informant's evidence becomes useless. Therefore, denial of a motion to discover the identity of the informant cannot be raised on appeal after a plea of guilty or nolo contendere, absent a showing of special conditions in

the plea bargain." (People v. Martino (1985) 166 Cal.App.3d 777, 789.)

A defendant may, however, attack the validity of a plea on the ground that it was "induced by misrepresentations of a fundamental nature," in this instance a belief that he could preserve for appellate review the issue of the Court's denial of his motion to discover the identity of the confidential informant. (See (People v. DeVaughn (1977) 18 cal.3d 889, 896.) A declaration that such a belief "was a factor" in a defendant's agreement to plead guilty is inadequate; a defendant must establish that his belief in the preservation of the issue for appeal "induced him to enter his plea." (People v. Ivester (1991) 235 Cal.App.3d 328, 340-341, emphasis added.)

Appellant has failed to make the requisite showing, and the Court's issuance of a certificate of probable cause does not operate to expand the grounds upon which an appeal may be taken. (People v. DeVaughn, supra, 18 Cal.3d 889, 896.)

Even if we were to conclude that the issue had been preserved, we would find no error in the Court's refusal to hold an in camera hearing in connection with appellant's motion to disclose the identity of the informant. Under Evidence Code section 1041, a public entity may refuse to disclose the identity of an informer when disclosure "is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice . . . . " Evidence Code section 1041, subdivision (d) "provides the courts with a method of determining whether nondisclosure of the informant's identity would deprive the defendant of a fair trial. [Citation.] 'Under the statute the court is to hold an adversary hearing on the issue of disclosure, and, if requested by the People, an in camera hearing from which the defendant and defense counsel will be excluded.'" (People v. Otte (1989) 214 Cal.App.3d 1522, 1530.)

We note that the People have a right to request an in camera hearing on the question of disclosure of an informant's identity (Evid. Code, §1042, subd. (d)), and no such request was made in this case. Moreover, "[i]t is incumbent on the defendant to make a prima facie showing for disclosure before an in camera hearing is appropriate." (People v. Oppel (1990) 222 Cal. App.3d 1146, 1152.) The court in this case found that appellant had failed to make this prima facie showing, a finding well supported by the record.

> "It is, of course, the defendant who bears 'the burden . . . to make a sufficient showing that the unnamed informer does have information which would be material to the defendant's guilt. [Citations.] This burden is met only where the defendant demonstrates through "some evidence" [citation] that there exists a "'reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration.'"' [Citation.]" (People v. Gordon (1990) 50 Cal.3d 1223, 1246.)

At the hearing on his disclosure motion, appellant referred to a statement in the search

warrant affidavit that the confidential informant indicated that he "had personally seen members of this group" in possession of cocaine. Since the informant did not say that he had seen all of the members of the group in possession of cocaine, appellant reasoned that it is possible the informant could give evidence that he had not seen the appellant in possession of cocaine.

The police investigation of this "group" was initiated by information from the confidential informant. Police surveillance began in late April, 1990, and continued through July, 1990, when the search warrant was sought. The court reasoned, and we agree, that even if the confidential informant could testify that he had not seen appellant with cocaine at the time he gave information to the police, appellant did not establish a reasonable possibility that such evidence would result in his exoneration for involvement in a cocaine transaction which occurred three months later. This is particularly true since appellant's prosecution was

based on a conspiracy theory in which he was understood to be acting as the bookkeeper.

Appellant did not make a prima facie showing of a reasonable possibility that the informant could give evidence on the issue of guilt which might result in appellant's exoneration. There was therefore no error in the court's refusal to hold an in camera hearing as to disclosure of the identity of the informant.

II

Validity of Search Warrant

Appellant contends that the trial court should have quashed the search warrant for his Wilshire Boulevard apartment and suppressed evidence seized pursuant to the search because the affidavit contained insufficient facts linking that address to illegal activity. We do not agree.

In deciding whether an affidavit for a search warrant establishes probable cause, "[t]he task of the issuing magistrate is simply

to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." (Illinois v. Gates (1983) 462 U.S. 213, 238-239.)

> "Under the federal standard, '[f]or probable cause to exist, a magistrate need not determine that the evidence sought is in fact on the premises to be searched, or that the evidence is more likely than not to be found where the search takes place. The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.' [Citation]" (People v. Koch (1989) 209 Cal.App.3d 770, 779, original emphasis.) "[A]n officer's law enforcement experience may be considered by the magistrate in determining whether or not the affidavit is sufficient. Inferences or deductions apparent to trained law enforcement officers may also be considered." (People v. Spears (1991) 228 Cal.App.3d 1, 17-18.)

Detective Moreno, the affiant in this case, began his affidavit with a description of his extensive training and experience in narcotics investigations. Turning to the specifics of this case, Detective Moreno then stated that he was investigating a group of three people, appellant, Dan Gold, and Hannan Dranes, who were suspected of distributing large amounts of cocaine in the Los Angeles area. The affiant received information from a confidential informant that the informant had seen members of this group in the possession of kilograms of cocaine. The informant viewed photographs of each suspect as part of the identification process.

According to the informant, Gold was the leader of the group, with the other two delivering cocaine at his direction. Detective Moreno checked records and learned that Gold had been convicted of a violation of Health and Safety Code section 11351 and was at that time on formal probation with search and seizure conditions. The pre-plea report in Gold's case

indicated that more than 10 pounds of cocaine had been seized, as well as several machine guns. That report also noted that Gold operated as a leader of a sophisticated distribution group that maintained a stash pad, narcotics leaders, and delivery workers.

From late April 1990 through July 12, 1990, Detective Moreno and other officers surveilled appellant, Gold and Dranes. Moreno observed that on numerous occasions, these individuals would meet, engage in counter-surveillance driving, beeper phone calls, cellular phone calls, and other activity consistent with narcotics dealing. Moreno followed each of the subjects to the addresses sought to be searched, and formed the opinion that Gold resided at the Tulsa Street address; appellant resided at the Wilshire Boulevard address in apartment 902, and according to the building management, appellant was known to them as David Cohen; and Dranes resided at the Willis Avenue address in apartment 305, and the management of that building knew Dranes as

David Cohen, the same name used by appellant at the Wilshire location.

The affiant then described an incident observed on June 1, 1990. At noon on that day, Dranes exited the Willis Street address through the underground security garage. He got into a gray Oldsmobile and drove to a parking lot at the southeast corner of Laurel Canyon and Ventura Boulevard, where he met Gold. Gold and Dranes drove around the block in the Oldsmobile for a short period of time and returned to the parking lot where Gold exited the Oldsmobile and entered his Ford Bronco. Gold then drove to Ventura Boulevard and Rhodes Avenue, with Dranes following him. They both parked, Dranes exited his vehicle empty-handed and entered Gold's Ford Bronco. Dranes stayed in the vehicle for approximately two minutes, then exited with a beige and brown carrying case which he had obtained from the interior of Gold's car. Dranes took the case back to his car. Gold then left the area.

Police officers followed Dranes to a Sav-On Drug parking lot at the northeast corner of Ventura Boulevard and Willis Avenue, where he met appellant. Dranes exited his vehicle with the same beige and brown carrying case he had obtained from Gold. He handed it to appellant, who took it and entered his green Mercedes Benz. Appellant then drove to the Willis Street address and parked his vehicle in front of the apartment building. He exited his car with the beige and brown carrying case that Dranes had given him and went inside the apartment building.

A short time later, Dranes exited the building into the underground parking lot with the beige and brown carrying case and got into the Oldsmobile. The beige and brown bag Dranes carried appeared to be the same shape, size and weight as the one appellant had taken into the Willis Street apartment.

Dranes drove to Burbank Avenue and Louise Avenue, parked the Oldsmobile and exited with the beige and gold carrying case. Dranes was

then picked up by a male Columbian driving a 1987 Chevrolet. The Columbian drove Dranes back to the Oldsmobile, where Dranes exited the Chevrolet empty-handed. Dranes left the area and the officers followed the male Columbian in the Chevrolet to Huntington Park, where another male Columbian was met. The first Columbian passed the beige and brown carrying case that he had received from Dranes to the second Columbian, who placed it in a gold, 1986 Chevrolet.

Police officers followed both vehicles to Firestone and the 605 Freeway, where they met a third Latin male, who was working with undercover police officers. This individual showed the two Colombians 10 kilograms of cocaine that the two Colombians were attempting to buy with the money inside the beige and brown bag which had been provided originally by Gold. A short time later police took the suspects into custody and found the beige and brown bag contained $140,000 in cash.

The affiant noted that appellant had been followed to the Wilshire Boulevard apartment on numerous occasions, and that this apartment, like the Willis Street apartment, is a multi-story complex with security garage parking underneath.

The affidavit described three other suspicious incidents involving Gold and Dranes, all of which involved meetings in cars and transfers of bags. Detective Moreno formed the opinion that the information received from the confidential informant regarding this group was totally valid. He believed that evidence demonstrated that Gold had returned to his previous practices of distributing large amounts of cocaine, using the help of others and multiple locations.

Detective Moreno then gave his expert opinion as to common practices of drug trafficking organizations:

> "It is further your affiant's opinion, based on training and experience gained during the service of dozens of search warrants, that persons involved in the large-scale trafficking of cocaine almost always

> keep records of their narcotic transactions. The trafficking of cocaine generates huge sums of money that requires the keeping of detailed records. On many occasions, your affiant has observed handwritten notes which depict narcotic transactions in pay-and-owe records and in customer lists complete with telephone numbers and addresses. These records are kept by narcotic dealers whether or not the dealer is in actual possession of narcotics at any given moment.

He continued:

> "It is further your affiant's opinion, based on experience and observation, that traffickers in cocaine who amass huge sums of illicit money from the sales of cocaine, quite often secure this money, along with narcotics, within a safe inside a location under their dominion and control. ¶ It is also your affiant's opinion, based on training, experience, and observation, that the trafficking of large amounts of cocaine requires the cooperation and association of a number of people within a narcotics distribution organization. As a result, persons who traffic in cocaine will possess documents that identify other members of the organization, such as telephone books, address books, telephone bills, and documents containing lists of names."

The affiant described other items he believed likely to be found which are related to narcotics trafficking, including records,

weighing devices, cutting material and containers. He also expressed the opinion that within any location searched there would be personalized utility bills pertaining to the location and personal letters addressed to occupants of the location as well as keys, wallets, purses, diaries and luggage tags which would contain personalization that would tend to identify the occupant of the premises.

> "It is your affiant's opinion that the seizure of these items, despite any lapse of time between the events described and the anticipated search by this warrant, will provide evidence of the events reported in this affidavit, and that the items have and will be used to aid in the commission of felony narcotics transactions."

Appellant argues that this affidavit contains no facts linking appellant's residence to illegal activity. In support of this position, he notes that during extensive surveillance, law enforcement agents did not observe any suspicious incidents at that address, and that neither Gold nor Dranes were ever observed at that location.

While mere evidence of a suspect's guilt does not establish probable cause to search his or her residence,

> "'[a] number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items. [Citations.]'" (People v. Gonzalez (1990) 51 Cal.3d 1179, 1206.)

In this case, while no specific criminal activity had been observed at the Wilshire address, the affidavit established that appellant was known at the Wilshire address as David Cohen, and that Dranes was known at the Willis Avenue address by the same fictitious name. Appellant was involved with Dranes in a portion of the June 5, 1990 cocaine transaction involving the Willis Avenue address. It has been recognized that "'[i]n the case of drug dealers, evidence is likely to be found where the dealers live.' [Citation.]" (People v. Cleland (1990) 225 Cal.App.3d 388, 393.) A magistrate could reasonably conclude that appellant's residence, where he was known by

the false name as the one used by Dranes at the Willis Avenue address, was linked to the same illegal activities.

Strengthening this conclusion is Detective Moreno's expert opinion in the affidavit that, in his experience, traffickers in large amounts of narcotics keep detailed records of their transactions, that they often secure the large sums of money involved in the transactions as well as the narcotics of a safe inside a location under their dominion and control, and that the trafficking of large amounts of cocaine involves the cooperation and association of a number of people within a narcotics distribution organization. A magistrate is entitled to rely on the conclusions of experienced law enforcement officers regarding where evidence of a crime is likely to be found. (See People v. Cleland, supra, 225 Cal.App.3d at p.393.)

As appellant was implicated as part of a group of drug traffickers, a magistrate could reasonably conclude that he might have records of the transactions, large sums of money, or

even the actual narcotics, inside a location under his dominion and control, his Wilshire Boulevard apartment. After a careful reading of Detective Moreno's affidavit, we conclude that the magistrate had a substantial basis for concluding that a search of appellant's Wilshire Boulevard apartment would uncover evidence of wrongdoing. The trial court did not err in denying appellant's motion to quash the warrant.

III

GOOD FAITH RELIANCE

Appellant argues that, in addition to lack of probable cause for the search, there was no good faith reliance on the warrant by Detective Moreno in executing the search. The record does not support this claim.

In United States v. Leon (1984) 468 U.S. 897, 900, the United States Supreme Court held that

> "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence

> obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."

The officer's reliance on the magistrate's determination of probable cause and on the technical sufficiency of the warrant must be objectively reasonable. (Id. at p.920, fn.20.) The inquiry in this regard is

> "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization" (Id. at p.922, fn.23; People v. Camarella (1991) 54 Cal.3d 592, 605-606.)

In this case, Detective Moreno had supplied a detailed affidavit in support of the search warrant reporting a three-month surveillance of appellant and two other suspects, including the June 1, 1990 incident involving appellant which resulted in a sale of a large quantity of cocaine. The affidavit contained reports of other activities involving appellant and the two other suspects which were, in the

officer's experience, consistent with narcotics dealing, including counter-surveillance driving and beeper and cellular phone calling. It also provided information that appellant used the same false name in renting his apartment as one of the other suspects used in renting his apartment. Detective Moreno reiterated in his affidavit the information he had received from a confidential informant regarding appellant's participation in a group trafficking in large quantities of cocaine, and expressed his belief, based on corroboration through surveillance, that this information was true.

Detective Moreno also stated that in his experience, drug traffickers often keep the contraband, money, pay and owe sheets, lists of names, and other indicia of the criminal activities in places under their dominion and control. In light of the information implicating appellant in the drug trafficking, his use of a false name in renting his apartment, and the officer's belief based on extensive drug enforcement experience that it was likely that

incriminating evidence would be found in that apartment, we conclude that Detective Moreno's reliance on the validity of the search warrant was objectively reasonable, within the meaning of Leon.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION
IN THE OFFICIAL REPORTS.

EPSTEIN, J.

We concur:

WOODS (Arliegh), P.J.

VOGEL (C.S.), J

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STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 4 DATE: 02/24/93

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RE: People of the State of California
vs.
Weingarten, Alex
(t/N Cohen, David)
2 Criminal B064351
Los Angeles NO. BA 021813

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

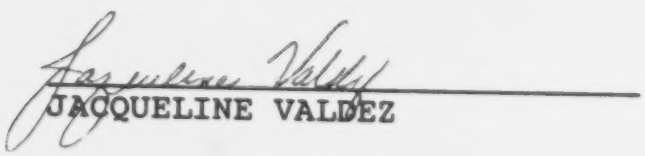
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 8383 Wilshire Blvd., Suite 750, Beverly Hills, CA 90211.

On July 16, 1993, I served the foregoing document described as **PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepared.

Executed on July 16, 1993, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



JACQUELINE VALDEZ

APB/7.15/PS:ma

(3)

FILED
AUG 17 1993

No. 92-204

In The

Supreme Court of the United States

October Term, 1993

SWAROVSKI INTERNATIONAL TRADING CORPORATION, A.G., SWAROVSKI MANAGEMENT AND CONSULTING, A.G., D. SWAROVSKI & CO., SWAROVSKI AKTIENGESELLSCHAFT, and SWAROVSKI AMERICAN LIMITED,

Petitioners,

v.

EBELING & REUSS, LTD. t/a EBELING & REUSS COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Swarovski International Trading Corporation, A.G.; Swarovski Management and Consulting, A.G.[1]; D. Swarovski & Co.; Swarovski Aktiengesellschaft;

[1] Swarovski Management & Consulting, A.G. is the former name of Petitioner D. Swarovski & Co. Respondent brought suit against the company under both names, although judgment was entered against it solely under the name of D. Swarovski & Co.

and Swarovski America Limited (collectively "Swarovski") respectfully request that the Court grant the Petition for a Writ of Certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit entered on April 7, 1993. None of the arguments advanced by Respondent in its Brief In Opposition justifies denial of the writ here. Indeed, Respondent's Brief is based on serious misapprehensions, if not outright distortions, of the law and the facts.

STATEMENT OF THE CASE

In the statement of the case contained in its Brief in Opposition, Ebeling & Reuss ("E&R") makes a number of errors that bear on the disposition of Swarovski's Petition for Writ of Certiorari. This is evidently done out of a license E&R feels that it has as a result of prevailing in the lower courts. However, victory below does not relieve E&R of its obligation to this Court.

Hence, contrary to E&R's assertion, *see* Brief in Opposition at 4, the early 1987 letter by Lawrence Metcalfe, President of Swarovski America Limited, was sent to Swarovski America Limited's own customers, not to the customers of E&R. *See* Rec. 4038. This misstatement is significant in light of the fact that this letter was the sole act of outrageous conduct identified by counsel for E&R, at oral argument before the Third Circuit, in support of the award of $16.5 million in punitive damages in this case. *See* Resp. App. 36-39. In addition, Swarovski had not, as E&R suggests, "secretly resolved to revoke E&R's

right to use the [Swarovski] name." *See* Brief in Opposition at 5. To the contrary, what the evidence at trial showed was that although Swarovski wanted E&R to stop using the name, and openly negotiated with E&R towards that end, Swarovski nevertheless took no action to prevent E&R's use of the Swarovski name until June 1988, when it sent a termination letter to E&R. *See* Rec. 2853; 2875-76. Equally unjustified is E&R's statement that it was forced into bankruptcy by reason of actions of Swarovski (there has never been any finding on this). *See* Brief in Opposition at 3. The Swarovski Petitioners do not want to argue facts at this late stage, but nonetheless believe that it is important to allow the Court to decide this Petition on a fair presentation of the case.

REASONS FOR GRANTING THE WRIT

In its Brief in Opposition, E&R raises a number of points in connection with the questions presented for review in Swarovski's Petition for a Writ of Certiorari. As demonstrated below, these points do not adequately explain the issues raised by the Third Circuit's disposition of this matter, nor do they provide reasons for declining to grant Swarovski's Petition for a Writ of Certiorari.

A. The District Court Improperly Allocated the Entire Punitive Damage Award to the One Affirmed Claim of Fraud

In the first question presented to the Court, the Swarovski Petitioners demonstrated that the Third

Circuit's affirmance of the district court's allocation of the punitive damages award creates a conflict between the Circuits. In response, E&R argues that the Third Circuit's decision, and presumably that of the district court, represents a correct application of *state* law. *See* Brief in Opposition at 15. In support of this assertion, E&R cites to this Court's decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989), in which the Court held that the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

E&R's reliance on *Browning-Ferris* is entirely misplaced. The first question presented in Swarovski's Petition for Writ of Certiorari deals with neither the *propriety* of an award of punitive damages, nor the *factors* the jury may consider in determining their amount. To the contrary, this question relates to the proper disposition by a federal court of an already determined punitive damage award when one or more of the claims underlying that award are later determined not to state a cause of action. Such a question is necessarily one of federal law. *See Williams v. Powers*, 135 F.2d 153, 156 (6th Cir. 1943); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, Civil § 2502 (1971). Indeed, this question has been treated as one of federal procedure by the Second, Fourth and Eleventh Circuits in analogous contexts. *See Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 104 (2d Cir. 1989); *Litman v. Massachusetts Mutual Life Ins. Co.*, 739 F.2d 1549, 1562 (11th Cir. 1984); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1034 (4th Cir. 1983).

Moreover, in contrast to the position asserted by E&R, *see* Brief in Opposition at 16, the Third Circuit's affirmance in this matter is in no way in accord with this Court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983). In *Zant*, the Court examined whether the Fifth Circuit erred in vacating the death sentence imposed on respondent. The Fifth Circuit in that case had vacated the respondent's sentence because one of several statutory aggravating circumstances that the jury expressly found was later declared to be unconstitutionally vague. Significantly, the jury in *Zant* had made explicit findings on *each* of these separate aggravating circumstances, each of which was itself sufficient to support the imposition of the death sentence.

Based on these facts, this Court reversed the Fifth Circuit's judgment on the ground that the case was not governed by the "rule derived from the *Stromberg* case . . . that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of these grounds is insufficient." 462 U.S. at 881. Continuing, the Court observed that the cases to which the *Stromberg* rule had been applied "all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested." *Id.* Based on this understanding of the scope and application of the decision in *Stromberg v. California*, 283 U.S. 359 (1931), the Court in *Zant* held that *Stromberg* did not require vacation of the respondent's death sentence "because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty." *Id.*

In contrast to the *Zant* case, the facts of this case fall within the clear confines of the *Stromberg* rule. Here, the jury returned a general verdict of fraud against Swarovski and gave a single award of punitive damages. This general verdict, both on liability and punitive damages, was premised on five separate and distinct acts of fraud which E&R claimed and argued to the jury. *See* Rec. 3253-56; 3337-41. However, the jury did not, as in *Zant*, make specific findings as to which of the five separate claims of fraud Plaintiff's general finding was based on; nor did it allocate the punitive damages among the fraud claims. This omission is significant because the district court's subsequent disallowance of all but one of the five claims, and the Third Circuit's affirmance of that decision, makes it impossible to determine whether the sole affirmed act of fraud is in fact the conduct which the jury sought to punish with the award of punitive damages. This impossibility goes to the heart of the *Stromberg* rule, and has been recognized by a number of federal circuit courts of appeal in virtually identical factual situations. *See Murphy Door*, 874 F.2d at 104; *Litman*, 739 F.2d at 1562; *Barnes Group*, 716 F.2d at 1034.

B. The Third Circuit's Affirmance of the $16,500,000 Punitive Damage Award Without Opinion Violates Swarovski's Procedural Due Process Rights.

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1992), this Court made it clear that appellate courts reviewing judgments for punitive damages are constitutionally obligated to make an independent review of the punitive damage award, both as to whether the evidence

supports such an award in any amount, and if so, whether the amount awarded is greater than that reasonably necessary to punish and deter.

More recently, in *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), the Court again recognized the critical nature of appellate review to the constitutionality of an award of punitive damages. As the plurality opinion in *TXO* states, the written opinion of the West Virginia Supreme Court of Appeals "gave careful attention to the relevant precedents." 61 U.S.C.W. 4766.[2]

In this case, the critical component of appellate review is entirely lacking. Despite the staggering absolute size of the punitive damage award, the Third Circuit failed to write one word explaining why punitive damages were warranted, and why the $16,500,000 amount was not unreasonably excessive.[3] Although the absence

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[2] It bears noting that at least seven Justices in *TXO* required some sort of meaningful appellate articulation. Four Justices concluded that the West Virginia Supreme Court had sufficiently stated its reasons to constitute adequate appellate review, while the three dissenting Justices felt the lower court did not adequately articulate its reasons for affirmance.

[3] Contrary to Respondent's assertion, *see* Brief in Opposition at 21, there is no question here of Petitioners having "waited too long" to challenge the substantive excessiveness of the punitive damage award, as well as the procedure by which it was affirmed. It should be noted in this regard that the "Motion to Strike" which Respondent filed in the Third Circuit was *denied* and that Petitioners, from the time the $16.5 million verdict was returned by the jury, have argued that it was excessive and that the trial court reached the "wrong result" substantively in entering judgment for that amount. *See* Resp. App. at 30.

of a written decision does not establish conclusively the absence of appellate review, it does insulate any presumed "appellate review" from meaningful scrutiny and make it significantly easier, through silence, to affirm while avoiding defense of the indefensible. Moreover, the very process of having to give reasons for a decision can reveal a lack of justification for that decision to the deciding court.

Because the Third Circuit failed to give reasons for its decision, it is impossible to ensure that its disposition of this case comports with the standards set forth in *Haslip* and *TXO*, as well as those that govern the award of punitive damages under state law. Put simply, the Third Circuit's failure to write an opinion makes it impossible to determine whether it conducted any appellate review of the punitive damage award, and if it did, under what standard the review was conducted. The procedure employed below does not satisfy this Court's standard as it can be determined from *Haslip* and *TXO*.

Moreover, contrary to Respondent's suggestion, a requirement that an appellate court state its reasons for affirming a $16.5 million punitive damage award will not, as a matter of due process, require written opinions in all contexts, including criminal affirmances. This Court recognized in *Haslip* that additional constitutional protections, like appellate court articulation of reasons for affirmance, were necessary in punitive damage cases precisely because the sorts of constitutional safeguards and limits available in other "punitive" contexts, most particularly criminal cases, were not applicable in civil trials for punitive damages – although the consequences could be equally, if not more, crushing to the defendant. Hence,

a defendant in a private civil suit faced with punitive damages will lack the protection of a clearly established, pre-existing standard for such liability, a set range of punishments, the "beyond a reasonable doubt" standard for liability, the requirement of a unanimous jury and the limits on fines imposed by the Eighth Amendment. *See Browning-Ferris*, 492 U.S at 275-76. In a largely standard-less area of severe punishment, the necessity that an appellate court at least be required to explain its actions in upholding penalties every bit as severe as those for which the greater safeguards of criminal procedure exist, is one of the civil defendant's few protections.

CONCLUSION

For the reasons set out above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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